No. 76-880

In the Supreme Court of the United States

OCTOBER TERM, 1976

HALTER MARINE FABRICATORS, INC., and
FIDELITY & CASUALTY OF NEW YORK, PETITIONERS

v.

JOHN L. NULTY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-17) is reported at 539 F. 2d 533. The opinion of the Benefits Review Board (Pet. App. A-20 to A-30) is reported at 1 BRBS 437. The administrative law judge's decision (Pet. App. A-31 to A-44) and supplemental opinion (Pet. App. A-45 to A-51) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-18 to A-19) was entered on September 27, 1976. The petition for writ of certiorari was filed on December 27, 1976

(a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Longshoremen's and Harbor Workers' Compensation Act provides compensation to a shipbuilder injured on land.

2. Whether the inclusion of shipbuilders within the amended Act exceeds Congress' admiralty powers.

STATEMENT

Respondent John L. Nulty was hired by petitioner Halter Marine Fabricators, Inc., as a carpenter in June 1972. Nulty initially was assigned to work on incomplete vessels, some of which were afloat upon navigable waters. In January 1973 he was reassigned to work in the shipyard's carpentry shop, building and fabricating furniture and other pieces of woodwork to be installed in vessels. At the time of his injury, Nulty performed most of his work in this shop, but he occasionally went aboard launched vessels to take measurements or to install or repair parts that had been fabricated in the carpentry shop (Pet. App. A-13, A-35).

Halter Marine is engaged in the construction of new ships (Pet. 4; Pet. App. A-35). Halter Marine owns and operates the shipyard at Moss Point, Mississippi, where Nulty was employed. The shipyard adjoins the navigable waters of the United States, and the building where Nulty usually worked is approximately 100 yards from the water (Pet. App. A-34, A-35). Halter Marine has never denied that it is an employer within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(4), or that Nulty was a shipbuilder.

On July 30, 1973, Nulty was fabricating a wooden structure that would hold a spare wheel on the deck of a vessel

that had been launched but not yet commissioned (Pet. App. A-33, A-35). Part of Nulty's left thumb and all of the fourth finger of his left hand were accidentally amputated by a table saw (*id.* at A-34). Halter Marine conceded that Nulty is entitled to workers' compensation, but it argued that he should be compensated under state law rather than under the federal Act.

The administrative law judge concluded that Nulty was a "shipbuilder" and, consequently, a covered "employee" within the meaning of Section 2(3) of the Act, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3). The Benefits Review Board agreed, as did the court of appeals. The administrative law judge, the Board, and the court of appeals all rejected petitioners' argument that "shipbuilders" must do their work upon the waters. The court of appeals also rejected petitioners' argument that the Act is not a proper exercise of Congress' admiralty powers.

ARGUMENT

1. There is no conflict among the circuits concerning the scope of the Act's coverage of "shipbuilders." Section 2(3) of the Act provides that "[t]he term 'employee' means any person engaged in maritime employment, including any * * * shipbuilder * * *." The court of appeals in the present case has concluded, in effect, that all shipbuilders are "employees," a construction of the statute that is not open to serious question. Accord, *Dravo Corp.* v. *Maxin*, 545 F. 2d 374 (C.A. 3), petition for a writ of certiorari pending, No. 76-1093.

Nulty was a shipbuilder, and petitioners never have contended otherwise. He was engaged, at the moment of his injury, in fabricating a portion of a vessel that already was afloat. His employment included visits to the vessel to take measurements or to install woodwork.

As the court of appeals put it, "the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation" (Pet. App. A-13). Under these circumstances, Nulty satisfied the status test of Section 2(3).[1]

Petitioners contend that this case has features in common with *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F. 2d 35 (C.A. 2), certiorari granted, December 6, 1976, *sub nom. Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444, and *International Terminal Operating Co.* v. *Blundo*, No. 76-454. Although this case, like *Caputo*, *Blundo* and other cases now pending in this Court,[2] presents a question concerning the meaning of Section 2(3), this Court's disposition of the other cases would not control the present case. The central issue in *Caputo* and *Blundo* is whether

[1]Nulty also satisfied the "situs" test of Section 3(a), which provides that the Act applies only to injuries on the navigable waters, including any "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel," 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a). Nulty was injured in a carpentry shop used by Halter Marine in the process of building vessels; petitioners have not contended that Nulty was not injured at a situs covered by the Act. The instant case therefore does not involve the situs question that was resolved in other consolidated cases that the court of appeals disposed of in the opinion below. We have presented the situs issue raised in one of these other cases in *Director* v. *Jacksonville Shipyards, Inc.*, petition for a writ of certiorari pending, No. 76-1166.

[2]See *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d 264 (C.A. 1), petition for a writ of certiorari pending, No. 76-571; *I. T. O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F. 2d 1080 (C.A. 4), modified in part *en banc*, 542 F. 2d 903, petitions for writs of certiorari pending *sub nom. Marine Terminals, Inc.* v. *Brown*, No. 76-706, and *Adkins* v. *I. T. O. Corp. of Baltimore*, No. 76-730. Questions concerning the Act's coverage of cargo handlers also are presented in *P.C. Pfeiffer Co.* v. *Ford*, No. 76-641, a petition for writs of certiorari to review two of the cases consolidated by the court of appeals with the instant case. See Pet. App. A-12 to A-13 (Ford); *id.* at A-13 to A-14 (Bryant).

certain persons engaged in the handling of cargo that is loaded and unloaded from vessels are "person[s] engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * * " within the meaning of Section 2(3). It is not likely that this Court's disposition of *Caputo* and *Blundo* will provide guidance concerning the meaning of "shipbuilder."

Even if this Court concludes in *Caputo* and *Blundo* that the cargo handlers are not engaged in maritime employment, this would not aid petitioners. Congress already has determined that all "shipbuilders" are "employees" for purposes of the Act, and a determination that certain cargo handlers are not employees would be irrelevant. Although, as petitioners point out (Pet. 7-9), *Caputo* and *Blundo* may decide whether cargo handlers shoreward of the "point of rest" of cargo are covered by the Act, the "point of rest" dispute is meaningful only in the context of cargo handling.

It may be that this Court eventually will be required to consider the extent to which the Act applies to shipbuilders who perform their tasks on land. But, as we have pointed out (page 3, *supra*), there is no conflict among the circuits on that question.[3] We submit that there is no reason to hold the present case pending the Court's disposition of *Caputo* and *Blundo*.

2. Petitioners' argument that the Act, as construed to cover shipbuilders injured on land, exceeds Congress'

[3]Two cases are pending in the Fourth Circuit dealing with the claims of shipbuilders. *Newport News Shipbuilding and Dry Dock Co.* v. *Director*, No. 77-1100; *Newport News Shipbuilding and Dry Dock Co.* v. *Director*, No. 76-2297. The instant case and *Dravo Corp.* v. *Maxin*, *supra*, are the only decided cases dealing with the Act's coverage of shipbuilders.

admiralty powers was correctly rejected by the court of appeals (Pet. App. A-14 to A-16). This Court recently declined to review a case involving a similar argument. *Norfolk, Baltimore and Carolina Lines, Inc.* v. *Director,* 539 F. 2d 378 (C.A. 4), certiorari denied, January 25, 1977 (No. 76-658). Every court of appeals that has considered the constitutionality of the extended coverage of the Act has concluded that Congress acted within the scope of its admiralty powers.[4] There is no reason for this Court to review that unanimous conclusion.

Crowell v. *Benson,* 285 U.S. 22, upheld the original Longshoremen's Act against arguments that it exceeded Congress' admiralty power. Moreover, the Court often has recognized Congress' paramount power to legislate with respect to maritime affairs. *The Lottawanna,* 21 Wall. 558; *Panama R.R.* v. *Johnson,* 264 U.S. 375; *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U.S. 21; *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354. Congress may not expand its admiralty authority beyond the scope of maritime concerns, but within the maritime sphere Congress has "wide discretion." *Panama R.R., supra,* 264 U.S. at 386.

Congress exercised this discretion when it extended the Act's coverage in 1972. In *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 223, and *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 216, this Court invited Congress to extend the Longshoremen's Act shoreward, and it said in the clearest terms that such an extension would be permissible. Congress accepted the invitation, and

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[4]See *Pittston Stevedoring Corp.* v. *Dellaventura, supra,* 544 F. 2d at 56-57; *Sea-Land Service, Inc.* v. *Director,* 540 F. 2d 629, 635-636. The constitutional issue has not been raised by petitioners in *Caputo* and *Blundo.*

petitioners offer no new considerations warranting re-examination of this Court's conclusion that the Admiralty Clause of the Constitution empowered Congress to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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